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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

CHARLES S. KRAVITZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Where inherently prejudicial publicity — the disclosure of a defendant's withdrawn guilty plea — is pervasively and continuously disseminated in the newspapers and on television throughout the community *during* defendant's trial and where the District Court does not individually *voir dire* the jury concerning such continuing publicity either during deliberations or, at least, following an unsequestered weekend recess, does the District Court's refusal to conduct a post-verdict hearing to *voir dire* the jurors individually in order to determine whether any juror learned during the trial of defendant's withdrawn guilty plea violate this Court's mandate in *Smith v. Phillips*, 455 U.S. 209 (1982) and *Remmer v. United States*, 347 U.S. 227 (1954) and require summary reversal and remand for such a hearing?

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October Term, 1984

CHARLES S. KRAVITZ,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Charles S. Kravitz respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this matter on October 3, 1984, and the Order of the Third Circuit entered on October 29, 1984 denying a Petition for Rehearing *In Banc* in this case. Because the lower court's holding is in direct conflict with this Court's decisions in *Smith v. Phillips*, 455 U.S. 209 (1982) and *Remmer v. United States*, 347 U.S. 227 (1954), summary disposition is appropriate and the cause should be remanded for a post-verdict hearing.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit, affirming the conviction and imposition of sentence of Petitioner, is not yet reported. A

copy of the Third Circuit's Opinion is reprinted in the appendix hereto at A-1. The Order of the Third Circuit denying Petitioner's Petition for Rehearing *In Banc* appears in the appendix at A-13. A copy of the June 20, 1983 Order of the United States District Court for the Eastern District of Pennsylvania denying Petitioner's post-trial motions is unreported and appears in the appendi at A-14.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on October 3, 1984. Petitioner's timely filed Petition for Rehearing *In Banc* was denied on October 29, 1984 and this Petition has been filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment Five, provides, in pertinent part, as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . .

The United States Constitution, Amendment Six, provides, in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .

STATEMENT OF THE CASE

The highly publicized trial of Charles S. Kravitz ("Kravitz") began in Philadelphia on Monday, April 11, 1983 and ended, after three days of trial and three days of deliberations by an unsequestered twelve-person jury, when that jury found Kravitz guilty of paying money to secure renewal of a dental plan contract with a local police fraternity.

The jury's guilty verdict was not surprising because, throughout the trial, the local newspapers and television media disseminated report after report — over a ten county area comprising the Eastern District of Pennsylvania — resoundingly highlighting the stark fact that Kravitz had previously pled guilty to the very charges for which he was being tried.[1] Nevertheless, the District Court: failed to sequester the jury during deliberations, including a weekend recess; failed to *voir dire* the jury individually either on each day the inherently prejudicial publicity appeared or, at least, following the unsequestered weekend recess; and ultimately, denied defendant's motion for a post-verdict hearing to determine whether any juror learned of Kravitz' withdrawn guilty plea during the trial.

A jury of twelve and two alternates was selected on Monday, April 11, 1983, and that day heard the opening statements of counsel and a few items of evidence. The following morning, the first prejudicial news report appeared. The April 12th morning edition of the *Philadelphia Inquirer*, which is read daily by over one-half million persons, contained an article displaying a prominent photograph of Kravitz and reported: "He *pleaded guilty* before U.S. District Judge James T. Giles earlier this year

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1. Kravitz' plea was entered pursuant to a plea agreement, which was later withdrawn for reasons not here relevant.

but later *withdrew his plea* and chose to go to trial." (emphasis added).[2]

Immediately, defense counsel moved the Court to have the jurors individually *voir dired* to determine their knowledge, if any, of the highly inflammatory article. The Court granted defendant's motion and asked each juror whether he or she had read or heard anything about the specific *Inquirer* article appearing that day. Each juror answered negatively until Juror Number 11 was questioned. He responded that he had actually brought a copy of the specific *Inquirer* (containing the prejudicial article) with him to the jury room that day, but that he had not yet read it. The Court merely instructed Juror Number 11 not to read any "article pertaining to this case," but continued to let him read the newspaper. The Court did not, however, order that the newspaper be removed from the jury room where, incredibly, it had lain during the entire time that the other jurors were being individually *voir dired* about that very article.

After all the jurors were *voir dired*, the Court told the collective panel not to read or view any news reports about the case. The Court, however, did not order the jurors to refrain from reading any newspaper or viewing any television news broadcast, even though the trial was expected to last only a few days and the Court knew that a highly prejudicial and inflammatory article had already been prominently printed in the *Inquirer*, which was readily available to all jurors. Instead, the Court merely instructed the jury:

> ". . . If you see something in the newspaper, just turn away from it or if you hear something on the radio, reporting the fact that this trial is going on, turn away

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2. The *Philadelphia Inquirer* has the largest circulation of any newspaper in Philadelphia and the surrounding counties (552,053 daily weekday readers as of March 31, 1983). *See* Audit Bureau of Circulation Audit Report.

from it or if you happen to be listening to television and there is some news report pertaining to the trial in this case, turn away from it.

"I will not restrict your access to all newspapers or to all parts of newspapers and some of you may be Celtic fans or Sixers fans and that's all, and you might be interested in baseball scores or something else in the newspaper or you may want to watch some television programs or listen to the news on the radio, but you have a responsibility to police yourselves as jurors when you are not in the courtroom."

That same evening, WCAU-TV Channel 10, the widely broadcast CBS local affiliate, featured a major report about the Kravitz trial. The report appeared during its 11:00 P.M. news program, which is viewed nightly by almost one-half million persons.[3] The broadcast explicitly highlighted, as the *Inquirer* had done that morning, Kravitz' withdrawn guilty plea to the same charges for which he was then on trial.

The following morning, April 13th, the *Inquirer* ran yet another article about the Kravitz trial, once again stressing that, "*Kravitz pleaded guilty* to the charges earlier this year, but later changed his plea to not guilty." (emphasis added). Defense counsel immediately renewed his request for the Court to *voir dire* the jury individually, now concerning *both* the prior evening's WCAU-TV news report and that morning's *Inquirer* article. This time, however, the Court inexplicably refused to follow the same simple prophylactic measure which it had appropriately employed the prior day. Instead, the Court decided to ask but one question of the jury *en masse*. As ball scores had ranked higher than a fair trial previously, expediency ruled this time:

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3. According to the Arbitron Ratings Book for March, 1983, over 481,000 persons watched the 11:00 P.M. WCAU-TV news program each night.

> "Ladies and gentlemen, did any of you yesterday view a television report or listen to any radio report or read any newspaper report concerning this case? [No response] Thank you very much."

Unlike the day before, the Court made no effort to refresh the jurors' recollection by specifying the particular prejudicial news article or television report in question. Nor did the Court ask the jurors, as it had done the day before, whether any of them had discussed any news article or television report with anyone else — a key alternative to having personally read or viewed the news report. The Court did not even ask the jurors whether any of them had brought a copy of the *Inquirer* to the jury room that day. In addition, the Court did not instruct the jurors to refrain from bringing newspapers with them into the jury room. In short, the Court continued to allow the jurors to have access to the news media despite the fact that two major newspaper articles and a television report had already appeared, each of which had focused upon the irreparably prejudicial and inflammatory fact that Kravitz had previously pled guilty.[4]

On Thursday, April 14, 1983, the critical day the jury was charged by the Court and began its deliberations, two articles concerning the Kravitz trial appeared in the morning edition of the *Philadelphia Daily News*, which is read by almost 300,000 readers daily.[5] The first article reported that Kravitz had "*admitted in court*" three months earlier to paying a bribe and further reported:

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4. Only after closing arguments, on the evening of April 13th, did the Court finally instruct the jury not to read any newspaper or listen to any television news report. However, again the Court failed to instruct the jury not to *discuss* news articles or television reports with anyone else.

5. The *Philadelphia Daily News* has the second largest readership in Philadelphia and the surrounding counties (297,022 daily weekday readers as of March 31, 1983). *See* Audit Bureau of Circulation Audit Report.

"Kravitz later withdrew his guilty plea, and this week he went on trial in U.S. District Court, before a jury that does not know about his prior confession." (emphasis added).

The second article, written by a widely read local columnist, contained Kravitz' photograph and appeared on the editorial page. It too was highly inflammatory, reporting Kravitz' alleged attempt to obtain renewal of the dental benefit contract. The columnist stressed that she could only use the term "allegedly" because *"Kravitz withdrew his guilty plea"* (emphasis added).

That morning, defense counsel moved for a mistrial based on the by-then plethora of prejudicial news reports floating throughout the community — all of which had specifically highlighted Kravitz' withdrawn guilty plea. The Court denied the motion, stating counsel had a "preoccupation" with the case and again failed to conduct individual *voir dire* of the jury.

The jury then deliberated throughout the day and twice forwarded written questions to the Court requesting clarifying instructions. At the end of the day, defense counsel moved the Court to have the jury sequestered for the remainder of their deliberations because of the continuing flood of irreparably prejudicial publicity concerning Kravitz' withdrawn guilty plea. The Court denied sequestration, stating that, "I think it would be a little heavy-handed."

The following day, Friday, April 15th, the jurors returned for their second day of deliberations. The Court again refused to *voir dire* the jury individually even though the afternoon editions of the previous day's *Daily News* containing the prejudicial articles had continued to circulate throughout the community during the prior evening. The jury's deliberations continued throughout the entire day with numerous written questions directed to the Court.

On the afternoon of that day, defense counsel moved for the sequestration of the jury at least for the weekend, recognizing that it would be impossible for the jurors over the entire weekend not to discover or overhear, even inadvertently, that Kravitz had previously pled guilty. The Court refused to sequester the jury after conducting an off-the-record in-chambers conference that afternoon, during which the local United States Marshal told the trial judge and counsel that it would be a "difficult" imposition on his office to arrange for the sequestration of the jury over the weekend on such short notice. After concluding the day's deliberations without reaching a verdict, the jury was dismissed for the weekend. At oral argument on post-trial motions, the Court provided the following after-the-fact explanation as to why it had not ordered sequestration of the jury at the critical time of deliberations when such a barrage of insidious publicity was saturating the community in which the jurors resided:

> "Although the Court has the power to sequester a jury after the jury is sworn and in the box, the circumstances did not seem appropriate to sequester the jury, notwithstanding the existence of that publicity out there in the world, but particularly given the fact that the jury would have had no warning that they were going to be sequestered and the sequestration, if it occurred, *would only have suggested that there was something in the newspapers or in the press that should be read by them,* not that they would violate my suggestion, *but the suggestion they would be sequestered* or the direction they would be sequestered in the middle of the trial *would suggest that something has happened that wasn't ongoing before.*" (emphasis added).

The Court did not explain how a sequestered jury, physically unable to obtain a newspaper or view television news broadcasts, could have possibly been affected

by the suggestion that "something has happened that wasn't ongoing before."[6]

On Monday, April 18th, the jurors returned from their unshielded weekend recess. Again, the Court refused to conduct individual *voir dire*, even at that critical juncture when no less than *four prejudicial articles and a television news program* had explicitly reported that Kravitz had previously pled guilty. Unlike the first two days of deliberations which were replete with questions to the Court, the jury asked no questions and proceeded to return its guilty verdict with surprising alacrity. Following the return of the verdict, the Court still failed to conduct any *voir dire* of the panel to determine whether any juror had learned at anytime during trial, and particularly over the weekend recess, of defendant's withdrawn plea of guilty.

The day following the trial, counsel for defendant *and* the government asked permission to interview the jurors. The Court refused to grant either request.

When post-trial motions were argued, defense counsel moved the Court to schedule, at a minimum, a brief post-verdict hearing to allow either the Court or the parties to *voir dire* the jurors individually. Counsel stated that a post-verdict hearing was essential because, throughout the trial, the Court had failed to implement even minimal procedural safeguards to ensure that the jurors were not exposed to the inherently prejudicial publicity. Such minimal safeguards could have been (1) se-

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6. Moreover, on the evening before deliberations began, the Court did, in fact, "suggest" to the jury that they could be sequestered when it finally instructed them not to read any newspaper or listen to any news report, stating:

> "[T]hat's *a small sacrifice for you*, for one evening or for such period of time as your deliberations might take, considering that *or sequestration*, I think is a much lesser burden upon you." (emphasis added).

Accordingly, the very harm that the Court stated might result if sequestration was ordered or even suggested to the jury was realized because of the Court's own remarks to the jury.

questration of the jury during their deliberations, or (2) conducting individual, not *en masse*, *voir dire* of the jury on each day that inherently prejudicial publicity appeared, or (3) at a minimum, conducting individual *voir dire* of the jury after they had returned from their unshielded weekend recess in the midst of deliberations. A post-verdict hearing, as defense counsel argued, would be for the decisive and limited purpose of:

> "ascertaining whether these 12 jurors learned of the publicity or learned of Dr. Kravitz's plea of guilty prior to their rendering their verdict, and it will not prejudice the jury, and we will not get into what went on in the jury room and not what happened with the jury deliberations, and don't want to know who voted which way. And a simple question, did you know Dr. Kravitz pled guilty or confessed to this crime?"

Defendant's post-verdict hearing request prompted the following response from the Court:

> THE COURT: "I have already asked the same questions of the jury during the trial, Counsel.
>
> "It's a way really of arguing again that the jury should have been *voir dired* individually on each day of the trial."

The Court did not explain what questions it was referring to, since direct questions concerning Kravitz' withdrawn guilty plea were obviously not posed to the jury during trial. Accordingly, defense counsel responded:

> MR. HOFFMAN: "No, it's to ascertain now whether or not any of the jurors may have been so prejudiced as a result of learning that information, who didn't come forward previously, who will now come forward if they are asked specifically the question.

THE COURT: "I have no reason to believe they lied to me in open court when I asked the question. So the motion is denied."[7]

On the day of sentencing, June 20, 1983, defense counsel again requested that the Court conduct a post-verdict individual *voir dire* of the jury. Counsel's renewed motion was promptly denied by the Court without even entertaining a response from the government. A-14. The Court then sentenced Kravitz on one count of the indictment to four years in prison and a fine of $25,000. On the second count of the indictment he received a sentence of five years probation and a $10,000 fine.

Petitioner Kravitz timely appealed the judgment of conviction and imposition of sentence of the District Court. On October 3, 1983, the United States Court of Appeals for the Third Circuit affirmed. Inexplicably, the critical issue raised here—whether Petitioner is entitled to a short post-verdict hearing to determine, once and for all, whether any juror knew at trial that Petitioner had previously pled guilty—was not even addressed by the Third Circuit in its Opinion.

A timely Petition for Hearing *In Banc* was filed by Petitioner on October 17, 1984 and was denied by the Third Circuit on October 29, 1984. A-13.

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7. To the contrary, defense counsel has recently discovered that at least one juror selected to serve in this case *did, in fact, lie to the Court* at trial. On April 11, 1983, during the *voir dire* of the jury panel, the Court asked all members whether, "Has either of you ever been convicted of a crime of any kind, whether its a misdemeanor or whatsoever." Only one juror at that time raised his hand in the affirmative. Anthony D. Morris, who was subsequently selected to serve on the jury which tried Kravitz, did not raise his hand. However, contrary to Juror Morris' denial of ever having been convicted of a crime -- felony, misdemeanor or whatsoever — Juror Morris was, in fact, convicted of the misdemeanor of retail theft in 1979, to which he pled guilty and paid a fine, costs and restitution. When jurisdiction is returned to the District Court, Petitioner will file an appropriate motion.

REASONS FOR GRANTING THE WRIT

THE DISTRICT COURT'S REFUSAL TO AFFORD PETITIONER AN OPPORTUNITY TO PROVE ACTUAL JUROR BIAS AT A POST-VERDICT HEARING VIOLATES THE MANDATE OF THIS COURT AND REQUIRES SUMMARY REVERSAL

In *Smith v. Phillips*, 455 U.S. 209 (1982), this Court clearly reaffirmed the fundamental principle of fairness that a defendant is *entitled* to a post-verdict evidentiary hearing to inquire into the effect of prejudicial occurrences during trial:

> This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.

455 U.S. at 215. Relying upon its earlier decision in *Remmer v. United States*, 347 U.S. 227, 230 (1954), which held that a defendant has a basic *right* to participate in a post-verdict hearing in which the circumstances and impact of prejudicial occurrences at trial are determined, this Court in *Smith* held that the trial judge acted properly by conducting a post-verdict hearing on the issue of juror bias. 455 U.S. at 215-16. The *Smith* Court also referred to its decision in *Chandler v. Florida*, 449 U.S. 560, 575 (1981), where it had held:

> *[T]he appropriate safeguard* against such prejudice [from publicity during trial] *is the defendant's right to demonstrate* that the media's coverage of his case — be it printed or broadcast — compromised the ability of the particular jury that heard the case to adjudicate fairly.

455 U.S. at 217 (emphasis added). Further, this Court in *Smith* quoted from its holding in *Dennis v. United States*, 339 U.S. 162, 171-72 (1950), where it had found:

> Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.

455 U.S. at 216.

In this case, repeated and pervasive publicity concerning Petitioner's withdrawn guilty plea would unquestionably have prejudiced the jurors if they had been exposed to such publicity during the trial. This Court and the lower federal courts are unanimous in holding that publicity which suggests to the jury a defendant's own consciousness of guilt or is otherwise directly probative of guilt is *inherently prejudicial*. *See, e.g., Patton v. Yount*, 104 S.Ct. 2885 (1984) (publicity of suppressed written and oral confessions); *Murphy v. Florida*, 421 U.S. 794, 798 (1975) (persons who learn from news sources of a "defendant's prior criminal record are presumed to be prejudiced"); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (disclosure of defendant's refusal to take a polygraph test); *Jackson v. Denno*, 378 U.S. 368 (1964) (involuntary confession); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) (television broadcast of defendant "confessing in detail to the crime with which he was later to be charged"); *Marshall v. United States*, 360 U.S. 310 (1959) (media disclosure of prior felony convictions).[8]

In light of that publicity and the District Court's failure either (1) to individually *voir dire* the jury on each day that inherently prejudicial publicity appeared or (2) to sequester the jury during deliberations, especially over the weekend recess, or (3) to, at the very least, *voir dire* the jurors individually following that recess, the only acceptable method of determining juror bias in the instant case was and is to conduct a *Smith/Remmer*-type post-

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8. *See also United States v. Herring*, 568 F.2d 1099 (5th Cir. 1978) (reports of death threats against a key prosecution witness); *United States v. Williams*, 568 F.2d 464 (5th Cir. 1978) (disclosure that defendant was convicted of the same charge at an earlier trial); *Mares v. United States*, 383 F.2d 805 (10th Cir. 1967) (report of a withdrawn guilty plea and excluded confession).

verdict hearing to ask each juror the simple question: "Did you learn during trial that Kravitz had pled guilty to the charges for which he was then being tried?" If any juror answers in the affirmative, it would be axiomatic that Petitioner was denied a fair trial, thereby requiring a new trial. It is obvious here, too, that the chances of detecting jury exposure to prejudicial publicity are only made possible at a post-verdict hearing — where the jurors can be asked directly whether they knew that Petitioner had withdrawn his guilty plea — because the specific nature of the publicity could not be mentioned during the non-specific *en masse* inquiries conducted by the Court during trial. *See Rushen v. Spain*, 104 S.Ct. 453, 456 (1983) ("The adequacy of any remedy [for discovering prejudice] is determined solely by its ability to mitigate constitutional error, if any, that has occurred. . . . Post-trial hearings are adequately tailored to this task.").

A. The District Court's Reliance Upon General *En Masse* Inquiry Makes A Post-Verdict Hearing All The More Imperative In This Case

The District Court's refusal to order a post-verdict hearing merely because the jurors responded negatively to its *en masse* inquiries during trial about exposure to publicity does not minimize the need for a post-verdict hearing — indeed, it makes it all the more imperative. In *Smith v. Phillips*, this Court also held that a defendant's right to a post-verdict hearing *includes* his right to determine whether, as here, the limited safeguards employed by the trial judge were, in fact, effective:

> The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, *are not infallible;* it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. . . . Such determinations [of prejudicial occurrences] may be properly made at

> a [post-trial] hearing like that ordered in *Remmer* and held in this case.

455 U.S. at 217 (emphasis added).

The admonition in *Smith* that *no safeguard is infallible* — even *voir dire* — highlights the error here of failing to conduct a post-verdict hearing where the District Court merely relied upon the inferior method of a superficial *en masse* inquiry as opposed to the far superior safeguard of individual *voir dire* in a case involving prejudicial in-trial publicity.[9]

The American Bar Association's ("ABA") Advisory Committee on Fair Trial and Free Press, after long study and analysis, prompted in part by this Court's decision in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), has recommended individual *voir dire* in cases, as here, involving inherently prejudicial in-trial publicity:

> If it is determined that material disseminated *during the trial* goes beyond the record on which the case is to be submitted to the jury and raises *serious questions of possible prejudice*, the court may on its own motion or shall on motion of either party *question each juror, out of the presence of others, about*

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9. Where, as here, publicity appears *during* the course of a trial and especially at the critical point when the jury begins deliberating, it is self-evident that there is a much *greater* risk of prejudice than in more common pretrial publicity situations. Thus, for example, the Fifth Circuit has held:

> The "during trial" cases, though fewer in number, contain greater opportunities for prejudice. For example, information reported during the trial seems far more likely to remain in the mind of a juror exposed to it, and *he may be more inclined to seek out this information when he is personally involved in the case*. . . . Consequently, a stricter standard should be employed in during-trial cases than in pretrial situations.

United States v. Williams, 568 F.2d 464, 468 (5th Cir. 1978) (emphasis added).

> *his exposure to the material.* The examination shall take place in the presence of counsel, and an accurate record of the examination shall be kept.

ABA Project on Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press, Standard 3.5(f) (1968) and Standard 8-3.6(f) (2d ed. 1980) (emphasis added). [10]

In failing to conduct individual *voir dire* of the jury, the District Court also acted contrary to the decisions of the United States Courts of Appeal for the Second, Fifth, Eighth, Ninth and Tenth Circuits. All five circuit courts have uniformly approved such a procedure and required their trial judges to take special precautions and examine each juror *individually* on each day that there is inherently prejudicial publicity to ensure that such in-trial publicity does not contaminate the jury's deliberations. [11]

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10. The ABA Advisory Committee has noted that only through *individual* questioning is a trial judge most likely to elicit truly candid responses from the jurors and thus overcome any reluctance one or more of them may have to speak out in front of their peers. ABA Standards, *supra*, Commentary to Standard 3.5(f).

Moreover, in *Patton v. Yount*, 104 S.Ct. 2885, 2892 & n.14 (1984), a case involving prejudicial *pretrial* publicity, this Court stated that only a "careful and thoroughgoing" *voir dire*, during which the trial judge is able to evaluate "[d]emeanor, inflection [and] the flow of questions and answers," can best ensure jury impartiality. Because *pretrial* publicity poses less potential for prejudice than *in-trial* publicity, a searching individual *voir dire* should, *a fortiori*, be required where, as here, inherently prejudicial publicity appears during the course of a trial.

11. *See, e.g., United States v. Gigante*, 729 F.2d 78, 81 (2d Cir.), *cert. denied*, 104 S.Ct. 2390 (1984) (approving individual *voir dire* of jurors held where prejudicial news articles appeared the day before defense summations were to be presented); *United States v. Herring*, 568 F.2d 1099, 1104-05 (5th Cir. 1978) (relying on ABA Standard 3.5(f), trial court erred when it failed to conduct an individual *voir dire* of jury after prejudicial news article appeared; Fifth Circuit held that individual *voir dire* was mandatory where published material "raises serious questions of possible prejudice"); *United States v. Krevsky*, 741 F.2d 1090, 1093 (8th Cir. 1984);

For example. in *Mares v. United States*, 383 F.2d 805 (10th Cir. 1967), the Court of Appeals dealt with the identical situation that occurred in the instant case — publication during trial of a defendant's withdrawn guilty plea. Finding that the trial court erred by failing to conduct an individual *voir dire* of the jurors, the Tenth Circuit held:

> We have an *extreme situation*, the reporting during trial of a *withdrawn guilty plea* and an excluded confession. . . . The nature of the article was such that the trial court should have immediately ascertained whether any jurors had been exposed to it. This could have been done without any reference to the nature of the article. *It should have been done by a careful examination of each juror out of the presence of the remaining jurors. . . . The overriding interest is that of the public to secure justice in a controversy between the government and an individual.* Under the circumstances, there was an "imperious necessity" to ascertain the fact of exposure and thereafter to take such action as might have been appropriate.

383 F.2d at 809 (emphasis added) (footnotes omitted). *See also Marshall v. United States*, 360 U.S. 310, 312 (1959) (jurors examined individually to determine exposure to prejudicial in-trial publicity of defendant's previous felony convictions).

In sum, this Court explicitly recognized in *Smith v. Phillips* that despite the safeguards of *voir dire* and other protective instructions, a post-verdict hearing is sometimes required to ensure the impartiality of a jury's verdict. Because the District Court here failed to take even

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Parker v. United States, 404 F.2d 1193, 1197 (9th Cir. 1968) (where, as here, defendant's *withdrawn guilty plea* was publicized by media during trial, trial court followed appropriate procedure and individually interviewed each juror to ensure that no one had been exposed to the prejudicial publicity); *Mares v. United States*, 383 F.2d 805, 809 (10th Cir. 1967).

the minimal precaution of individual *voir dire* following the jurors' recess for the weekend when they were surrounded by an atmosphere of prejudicial publicity, relying only upon the inferior method of *en masse* inquiry, a post-verdict hearing became an "imperious necessity."[12]

B. The Unusual Circumstances Of This Case Further Demonstrate The Necessity Of A Post-Verdict Hearing To Determine Whether The Verdict Was Contaminated

In this case, Petitioner's request for a post-verdict hearing is not based upon mere suspicion of juror bias.[13] On the contrary, the likelihood is overwhelming that the jurors were exposed during trial to the fact of Kravitz' withdrawn guilty plea. First, during the six-day trial, no less than four separate articles appeared in two widely circulated newspapers explicitly reporting that Kravitz had previously pled guilty to the charges for which he was then on trial. Second, a widely viewed television news program broadcast that same prejudicial fact during trial. Third, a copy of a newspaper containing one of the prejudicial articles was admittedly brought to the jury room by a juror and not ordered by the Court to be removed from the jury room. Fourth, the Court did not order the jurors to refrain from reading newspapers, or viewing television news broadcasts, or even from bringing newspapers with them into the jury room during the trial until

12. Although any *en masse voir dire* is insufficient to deal with inherently prejudicial in-trial publicity, the particular superficial and incomplete nature of the District Court's *en masse* inquiry here increased the likelihood that juror exposure to the publicity would go undetected. *See* pp. 6-9, *supra*.

13. Although the circumstances surrounding the trial already raise grave doubts concerning the impartiality of the jurors' verdict, the District Court is itself solely responsible for the absence of even more conclusive evidence establishing that the verdict was tainted because it has prohibited counsel for both Petitioner and the government from making any contact whatsoever with the jurors.

after two of the four prejudicial articles and the inflammatory television broadcast had already appeared. Fifth, it is now known that at least one juror selected lied to the Court when the venire was questioned *en masse*, thereby rebutting any possible assertion that the jury was truthful in response to the Court's questions or followed its instructions.[14] Sixth, on the first day of the jury's deliberations, even though two articles had appeared that morning declaring that Kravitz had previously pled guilty, the Court refused to sequester the jurors for the remainder of their deliberations or even to *voir dire* the jurors individually at that critical juncture. Seventh, the Court allowed the jury to return home for the weekend after two days of deliberations, even though by-then inherently prejudicial publicity concerning Kravitz' prior guilty plea was widely scattered throughout the local community. Finally, even after the weekend recess, the Court refused to *voir dire* the jury individually as to whether anyone had been exposed to any prejudicial publicity concerning Kravitz over the weekend.

Moreover, the manner in which the jury reached its verdict further compels such a post-verdict inquiry. Significantly, the jury deliberated for two full days without returning a verdict. Then, after spending a weekend recess in an atmosphere permeated by the plethora of prejudicial information, the jury found Petitioner guilty the following Monday after only a few more hours. It was simply unrealistic of the District Court to believe that such highly prejudicial and inflammatory publicity did

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14. Accordingly, the District Court's assertion that it would not conduct a post-verdict hearing because it had no reason to believe that any juror lied in response to its *voir dire* questions lacks merit. *See* n.7, *supra*, indicating that at least one juror lied in response to the Court's *voir dire* questions. *See also Silverthorne v. United States*, 400 F.2d 627, 641 (9th Cir. 1968) (once it is shown that a juror has disobeyed the court, "little if any weight" is given to the common assumption that the jury will heed the court's admonitions and avoid contact with publicity concerning the case).

not have an adverse impact upon the jury. *See United States v. Titsworth*, 422 F.Supp. 587, 591 (D.Neb. 1976) (where the jury deliberated for over five hours without result, the return of a guilty verdict within twenty minutes the next morning was inescapably linked with a prior prejudicial newscast).

All the above undisputed factual circumstances clearly mandate a *Smith/Remmer*-type post-verdict hearing in order to determine decisively whether the verdict was, in fact, contaminated by the inherently prejudicial publicity during trial concerning Kravitz' withdrawn guilty plea.

C. Summary Disposition Is Warranted Because The District Court Disregarded This Court's Mandate In *Smith v. Phillips* And *Remmer v. United States*

The *Smith v. Phillips* directive that a defendant has a *right* to prove jury bias at a post-verdict evidentiary hearing has not lost its vitality, at least in this Court. It was recently reaffirmed in *McDonough Power Equipment, Inc. v. Greenwood*, 104 S.Ct. 845 (1984), where this Court remanded for a post-verdict hearing to determine whether a juror's failure to answer a *voir dire* question correctly was sufficiently prejudicial to warrant a new trial. 104 S.Ct. at 850.[15] In a concurring opinion joined by Justices Stevens and O'Connor, Justice Blackmun confirmed that:

> the normal avenue of relief available to a party who is asserting that he did not have the benefit of an impartial jury [is] a post-trial hearing at which the movant has the opportunity to demonstrate actual bias. . . .

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15. *See also United States v. Powell*, 53 U.S.L.W. 4012, 4015 (U.S. Dec. 10, 1984) (unanimous Court explicitly recognized *Smith v. Phillips* as an exception to the rule that "once the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment").

104 S.Ct. at 850 (Blackmun, J., concurring). Moreover, in *Rushen v. Spain, supra,* this Court approved the use of a post-verdict hearing to ascertain the prejudicial effect, if any, of *ex parte* communications between the trial judge and a juror. 104 S.Ct. at 456 and n.3. Finally, all the federal Circuit Courts of Appeal that have addressed this important issue of fairness — with the sole exception of the Third Circuit — have faithfully followed this Court's clear mandate and recognized a defendant's right to a post-verdict hearing, even in cases where the alleged jury bias was far less compelling than here.[16]

The District Court's out-of-hand refusal to afford Petitioner an effective opportunity to demonstrate that the jurors were exposed to prejudicial publicity concerning his withdrawn guilty plea is in direct conflict with the unambiguous mandate of this Court set forth in *Smith* and *Remmer* and requires summary reversal, without the necessity of a full hearing adding to this busy Court's docket. *See Thompson v. Louisiana,* 53 U.S.L.W. 3396, 3397 (U.S. Nov. 27, 1984) (*per curiam*) (case summarily reversed where lower court's holding was in direct conflict with a decision of this Court); *Boag v. MacDougall,* 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting) (summary disposition warranted where the Court is called upon to enforce a recognized and fundamental constitutional right and to exercise supervisory power over the lower federal courts); *Schweiker v. Hansen,* 450 U.S. 785, 791 (1981) (Marshall, J., dissenting) (summary disposition is appropriate where "the law is settled and stable,

16. *See, e.g., United States v. DeLutis,* 722 F.2d 902, 909 (1st Cir. 1983); *United States v. Moon,* 718 F.2d 1210, 1235 (2d Cir. 1983), *cert. denied,* 104 S.Ct. 2344 (1984); *United States v. Hines,* 717 F.2d 1481, 1491 (4th Cir. 1983), *cert. denied,* 104 S.Ct. 2656, 2668 (1984); *De La Rosa v. Texas,* 743 F.2d 299, 303 (5th Cir. 1984); *United States v. Pennell,* 737 F.2d 521, 529-34 (6th Cir. 1984); *Owen v. Duckworth,* 727 F.2d 643, 646 (7th Cir. 1984); *Irons v. Lockhart,* 741 F.2d 207, 208 (8th Cir. 1984); *Rogers v. McMullen,* 673 F.2d 1185, 1189-90 (11th Cir. 1982), *cert. denied,* 459 U.S. 110 (1983).

the facts are not in dispute, the decision below is clearly in error"); *Leis v. Flynt*, 439 U.S. 438, 458 (1979) (Stevens, J., dissenting) (summary disposition permitted where the Court is not facing a "novel constitutional question").

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to the Court of Appeals for the Third Circuit summarily reversing the decision below and remanding the matter for a post-verdict hearing in accordance with this Court's decisions in *Smith v. Phillips* and *Remmer v. United States*.

Respectfully submitted,

/s/ Alan J. Hoffman

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Dated: December 28, 1984

APPENDIX

THIRD CIRCUIT OPINION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-1484

UNITED STATES OF AMERICA,

Appellee

v.

CHARLES S. KRAVITZ,

Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA
(D. C. Crim. No. 82-00370-01)

Argued: January 24, 1984
Before GIBBONS, *Circuit Judge*,
and ATKINS, *District Judge**

Resubmitted Pursuant to Rule 12 (6)
September 26, 1984
Before ALDISERT, *Chief Judge*,
GIBBONS, *Circuit Judge*,
and ATKINS, *District Judge**

(Opinion filed October 3, 1984)

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*Hon. C. Clyde Atkins, United States District Judge for the Southern District of Florida, sitting by designation.

THIRD CIRCUIT OPINION

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OPINION OF THE COURT

GIBBONS, *Circuit Judge*:

Charles Kravitz appeals from a judgment of sentence imposed following his conviction for violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (1982) ("RICO") and the Travel Act, 18 U.S.C. § 1952 (1982). He contends that his conviction should be set aside, and that in any event the court erred in ordering forfeiture of his interest as a stockholder in American

Health Programs, Inc. (AHP). We hold that his objections to the RICO and Travel Act convictions are without merit,[1] and that the forfeiture order was proper. Thus we affirm.

I.

Kravitz, a dentist, was the sole stockholder of AHP, a corporation engaged in the health care delivery business. In order to obtain a renewal of a contract for dental and other services with the Philadelphia Fraternal Order of Police (FOP), Dr. Kravitz made three cash payments totalling $7,000 between May 14, 1982 and June 4, 1982 to Robert Hurst, President of the FOP. He also made one payment of $1,000 to Michael Lutz, Secretary of the FOP. Both Hurst and Lutz were at the same time working undercover with the F.B.I. Kravitz was indicted for violation of RICO and the Travel Act, 18 U.S.C. §§ 1952, 1961-1963 (1982). The predicate offenses for the RICO violation were the briberies of Hurst and Lutz. Kravitz was tried before a jury and convicted on one RICO count and one Travel Act count. On the RICO count, Kravitz was sentenced to four years incarceration and a $25,000 fine.

After the jury returned a guilty verdict on the RICO count, several questions were prepared for submission to the jury. Under Rule 31(e) of the Federal Rules of

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1. Kravitz had argued that: (1) the predicate acts underlying his federal convictions were manufactured by the government; (2) he did not violate the Pennsylvania commercial bribery statute, 18 Pa. Cons. Stat. Ann. § 4108 (Purdon 1983), and therefore did not commit the required predicate offenses for RICO and Travel Act convictions; (3) he was prejudiced by the trial court's failure to instruct the jury regarding his theory of the case; (4) the trial court impermissibly amended the grand jury's indictment by dismissing that portion relating to securing the AHP-FOP contract in 1979; and (5) he was denied a fair trial due to the court's failure to take adequate measures to prevent jury exposure to in-trial publicity.

THIRD CIRCUIT OPINION

Criminal Procedure, if an "indictment . . . alleges an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." The government proposed the following questions:

(1) Did the defendant own any shares of stock in American Health Programs?

(2) Did he maintain this interest in violation of the racketeering laws?

(3) Shall such shares of stock be forfeited to the United States?

(4) Did the defendant hold a position in American Health Programs which gave him a source of influence over the company?

(5) Did he use the position to conduct the affairs of American Health Programs through a pattern of racketeering activity?

(6) Shall the defendant be required to forfeit his position to the United States?[2]

The jury answered questions 1, 2, 4, and 5 affirmatively, and thereby found that Kravitz had used his ownership position in AHP to engage in a pattern of racketeering activity. Despite the conclusion such responses would seem to compel, the jury answered questions 3 and 6 in the negative. Although it was the government that originally prepared the questions, prior to their submission, it attempted to withdraw questions 3 and 6. Although the court submitted the questions over the government's objections, it specifically reserved for argument whether those

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2. Prior to submission of the questions, a stipulation was reached that Kravitz was the sole stockholder of AHP.

questions, if answered negatively, were binding on the court. The district court subsequently decided that they were not. The court refused to follow the jury's recommendation and ordered forfeiture of Kravitz's stock and position in AHP.

II.

Appellant raises three arguments on appeal on the forfeiture issue: (1) even if the forfeiture of property held in violation of RICO is mandatory, it was for the jury to decide the extent of the property used to conduct racketeering; (2) having had questions 3 and 6 submitted to the jury, appellant acquired a sixth amendment right to trial by jury on those issues; and (3) forfeiture was in violation of the eighth amendment's ban against disproportionate sentence.

A.

A primary question presented by this appeal is whether forfeiture under section 1963 is mandatory upon a finding that the appellant's property was used to promote racketeering. We conclude, as have all other courts to decide the question, that forfeiture is mandatory. *See United States v. Hess*, 691 F.2d 188, 190 (4th Cir. 1982); *United States v. Godoy*, 678 F.2d 84, 88 (9th Cir. 1982), *cert. denied*, ____ U.S. ____, 104 S.Ct. 390 (1983); *United States v. L'Hoste*, 609 F.2d 796, 809-11 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980).

Several factors compel that conclusion. The first is the plain meaning of the language employed in section 1963(a), stating that "[w]hoever violates any provision of section 1962 . . . shall forfeit to the United States" the illegally used interests. As the Fifth Circuit pointed out in *L'Hoste*, although there are occasions where "shall" has been interpreted to vest discretionary, rather than mandatory, authority to act, the wording

of the statute is the most persuasive evidence of Congressional intent. *L'Hoste, supra*, 609 F.2d at 810. Nor does the legislative history ever discuss forfeiture in discretionary terms, *see, e.g.*, H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 57, *reprinted in* 1970 U.S. Code Cong. & Ad. News 4007, 4033; S. Rep. No. 91-617, 91st Cong., 1st Sess. 160 (1969). The wording of the remaining penalties established under section 1963(a) also supports a mandatory interpretation of forfeiture: section 1963(a) states that a defendant "shall be fined not more than $25,000 or imprisoned not more than twenty years, or *both*" (emphasis added). Thus, where Congress intended for the penalty to be optional, as in the choice between fine or imprisonment, they specified that there was such a choice. The section's wording provides no choice regarding the imposition of forfeiture.

Moreover, a literal reading of section 1963(a) is consistent with RICO purposes. The criminal forfeiture provision was viewed as an innovative means of addressing the spread of organized crime that has infiltrated so many aspects of American society. Of foremost concern during the Congressional hearings on RICO was the weakness of current efforts at curtailing the spread of organized crime to legitimate business endeavors. For instance, the Senate Judiciary Committee's report quoted the Attorney General's testimony that:

> While the prosecutions of organized crime leaders can seriously curtail the operations of the Cosa Nostra, as long as the flow of money continues, such prosecutions will only result in a compulsory retirement and promotion system as new people step forward to take the place of those convicted.

S. Rep. No. 91-617, 91st Cong., 1st Sess. 78 (1969). The report stated that forfeiture as a penalty for the

criminal offense -- although disfavored throughout American history, *id.* at 79 -- was an innovative approach which could provide the linchpin in the renewed effort against organized crime:

> Title IX recognizes that present efforts to dislodge the forces of organized crime from legitimate fields of endeavor have proven unsuccessful. To remedy this failure, the proposed statute adopts the most direct route open to accomplish the desired objective. Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal law approach of fine, imprisonment and forfeiture, or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity.

Id.

In light of RICO's central goal of inhibiting organized crime's infiltration of legitimate business, it is certainly not likely that forfeiture was viewed by its drafters as an optional penalty. At the least, a mandatory interpretation of section 1963(a)'s forfeiture would promote, rather than discourage, RICO's intended purpose. Indeed, it is consistent with RICO's own construction clause, Pub. L. No. 92-452, § 904(a), 84 Stat. 922, 947 (1970), which states that the statute "shall be liberally construed to effectuate its remedial purposes."

When Congress has opted to provide for discretionary forfeiture, it has done so expressly. Thus, under the Internal Revenue Laws there is district court discretion to remit or mitigate the forfeiture. 18 U.S.C. § 3617 (1982). The Organized Crime Control Act itself elsewhere contains a permissive, rather than mandatory, forfeiture provision. In establishing

penalties for illegal gambling. Congress provided that "[a]ny property . . . used in violation of the provisions of this section may be seized and forfeited to the United States." 18 U.S.C. § 1955(d) (1982).

Finally, we note that where Congress did provide for the remission or mitigation of the forfeiture order, it vested that decision-making authority with the Attorney General, not the federal courts. Section 1963(c) explicitly incorporates "[a]ll provisions of law relating to the . . . remission or mitigation of forfeitures for violation of the customs laws . . ."; it also imposes upon the Attorney General "[s]uch duties as are imposed upon the collector of customs . . . with respect to the disposition of property . . . ." Under the customs laws, it is the Attorney General who has the authority to grant remission or mitigation. *See, e.g., United States v. One 1970 Buick Rivera, Ser. 494870H910774*, 463 F.2d 1168, 1170 (5th Cir.), *cert. denied*, 409 U.S. 980 (1972).[3] Moreover, courts have uniformly held that the remission decision of the Attorney General is not open to judicial review. *Id.* at 1170. Therefore, since 1963(c) vests the Attorney General with the powers given him under the customs laws, we conclude that any petition for remission or mitigation must be brought before the Attorney General, and that the federal courts have no authority to modify or review that decision. *Cf. United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1970), *cert. denied*, 445 U.S. 927 (1980) (the Attorney General's power to seize the property upon the terms and conditions set

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3. Although the customs statutes, 19 U.S.C. §§ 1613, 1618, vest that authority with the Secretary of the Treasury, Executive Order No. 6166 (June 10, 1983) transferred the remission and mitigation authority to the Attorney General when the forfeiture is ordered in a judicial proceeding. *One 1970 Buick, supra*, 463 F.2d at 1170, n.2.

by the court provides for limited judicial modification of the forfeiture order). The role of the federal courts is thus limited under RICO to entry of judgment in accord with the jury's answers to the interrogatories, submitted pursuant to Rule 31(e) of the Federal Rules of Criminal Procedure.[4]

B.

Kravitz also argues, without explanation or citation, that he "acquired" a right to trial by jury by virtue of the court's submission of the questions, pursuant to Rule 31(e). This argument has several flaws. Since section 1963 is mandatory, not even the district court has the authority to refrain from ordering forfeiture.[5] Surely the court cannot delegate to the jury authority which it itself has not been given by the governing statute. No theory is offered to explain how a defendant acquires a right to sentencing by the jury when the applicable criminal statute, section 1963 of RICO, makes no such provision. Although a criminal

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4. Kravitz also argues that the jury's refusal to order forfeiture amounted to an evaluation that only a small percent of AHP was used to promote racketeering. Therefore, he says, assuming the mandatory nature of forfeiture under § 1983(c), forfeiture was improperly ordered. Kravitz's characterization, however, amounts to nothing more than legerdemain. The jury clearly stated, in answers 2 and 5, that Kravitz's interest in AHP, both as stockholder and officeholder, were maintained in violation of the racketeering laws. They did not decide that little or none of AHP was used to promote racketeering. They merely decided, for reasons unknown, that despite this illegal use of his company, forfeiture was not the proper remedy. Since we have held that RICO imposes mandatory forfeiture to the extent that the property is determined to have been used for racketeering, Kravitz's argument must fall.

5. Of course, the defendant can apply to the Attorney General for remission or mitigation. No application has been made to date in the instant case.

statute may provide for juror participation in sentencing, the right to trial by jury does not compel such participation. *Cf., United States v. Wilson*, 506 F.2d 521, 522-23 (9th Cir. 1974); *United States v. Del Toro*, 426 F.2d 181, 184 (5th Cir.), *cert. denied*, 400 U.S. 829 (1970) (function of jury is to determine facts and guilt or innocence; function of judge is to impose sentence).

Kravitz also challenges the forfeiture on eighth amendment grounds. He argues that forfeiture constitutes a disproportionate penalty because AHP's contract with the FOP expired prior to indictment.[6] Since AHP was no longer providing services pursuant to the illegally secured contract, Kravitz would have us accept that the taint upon the property had dissipated, and thus that the order of forfeiture was cruel and unusual punishment, in violation of the eighth amendment.

Kravitz's eighth amendment argument completely ignores the nature of RICO's forfeiture provision. Forfeiture under RICO is an in personam penalty designed as part of the punishment for the criminal offense committed. *United States v. Cauble*, 706 F.2d 1322, 1349 (5th Cir. 1983), *cert. denied*, ___ U.S. ____, 104 S.Ct. 996 (1984); *United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980). It is simply incorrect that the termination of the criminal conduct bars the imposition of punishment. Although in personam forfeiture is not commonly used in our system of jurisprudence, *see*

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6. Kravitz has also argued in his original brief on appeal that forfeiture violated the eighth amendment because he hid, prior to indictment, his stock interest in AHP trust. In his reply brief it appears that appellant waived his "divestiture" argument, stating that at sentencing "appellant conceded that his stock interest was subject to forfeiture despite the transfer."

United States v. Cauble, supra, 706 F.2d at 1345, it is nonetheless a legitimate weapon in the enforcement of our criminal laws and, as with any punishment for criminal conduct, may be imposed despite the cessation of the criminal conduct charged in the indictment. *Cf. Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 444 (1957) (forfeiture of obscene materials in an in rem proceeding is "a legal remedy sanctioned by the long history of Anglo-American law") (citations omitted).

Although Kravitz raises the point rather indirectly, he also suggests that forfeiture constitutes a disproportionate punishment because appellant's racketeering activities were, at most, a minor or remote part of AHP's medical practice. Appellant relies on two Second Circuit decisions, *United States v. Huber*, 603 F.2d 387, 396-97 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), and *United States v. Walsh*, 700 F.2d 846, 857 (2d Cir.), *cert. denied*, ___ U.S. ___, 104 S.Ct. 96 (1983). In *Huber*, the Second Circuit, in dicta, suggested that the eighth amendment may place limitations upon the forfeiture of property used to promote racketeering. The same suggestion was made in *Walsh*. Neither *Huber* nor *Walsh*, however, invalidated a forfeiture on eighth amendment grounds, nor conclusively stated that such a challenge would succeed. The *Huber* court merely stated that the remission and mitigation provisions of section 1963 could prevent eighth amendment problems, which might arise if the property to be forfeited was used only incidentally by the defendant to promote his racketeering.

Moreover, even if the eighth amendment does provide an outer limit upon RICO's forfeiture provision -- a point we need not decide today -- it is clear that in this case the ordered forfeiture is proportionate to the illegal racketeering activity. In the instant case, the

property seized was used to promote Kravitz's racketeering scheme -- as the *Huber* court suggested, "keyed to the magnitude of a defendant's criminal enterprise," *Huber, supra*, 603 F.2d at 397 -- and certainly was as integral to the racketeering schemes as in other cases where forfeiture was imposed under RICO. *See, e.g., United States v. L'Hoste*, 609 F.2d 796 (5th Cir. 1980), *cert. denied*, 449 U.S. 833 (1980) (defendant's stock interest in his company ordered forfeited due to use of company to secure government contracts through illegal kickbacks).

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts, G.M.C. Printing, Phila., Pa. 215-568-4264)

THIRD CIRCUIT JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1483

UNITED STATES OF AMERICA,
Appellee

v.

CHARLES S. KRAVITZ,
Appellant

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ John J. Gibbons
Judge

Dated: October 29, 1984

E. D. PA. JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL
	:	NO. 82-0370
CHARLES S. KRAVITZ	:	

ORDER

AND NOW, this 20th day of June, 1983, for the reasons stated in the Bench Opinion rendered on June 20, 1983, it is hereby ORDERED that:

1. Defendant's Renewed Motion for Judgment of Acquittal or, in the Alternative, Motion for Arrest of Judgment or New Trial is DENIED.

2. Defendant's Motion for Post-Trial Individual Voir Dire of the Jury is DENIED.

BY THE COURT:

/s/ James T. Giles

J.

FILED
FEB 28 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1065

In the Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES S. KRAVITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether the district court, which took a number of steps to ensure that the jury was not exposed to prejudicial publicity during trial, committed reversible error in not conducting individual voir dire of each of the jurors throughout the trial and not holding a post-trial hearing on the issue of juror exposure.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1065

CHARLES S. KRAVITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 738 F.2d 102.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1984. A petition for rehearing was denied on October 29, 1984 (Pet. App. A13). The petition for a writ of certiorari was filed on December 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of engaging or participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count One), and of using or causing the use of a telephone in order to carry on bribery,

in violation of 18 U.S.C. 1952 (Count Five) (Pet. App. A2). Petitioner was sentenced to a four-year term of imprisonment on Count One to be followed by five years' probation on Count Five. He was also fined a total of $35,000 and ordered to forfeit his stock in American Health Plans, Inc. C.A. App. 1301a.[1]

1. The evidence at trial established that petitioner, a dentist, was the principal officer of American Health Plans, Inc. (AHP), a corporation that provided dental, optical, and prescription service by contract with Lodge 5 of the Philadelphia Fraternal Order of Police (FOP) (C.A. App. 475a-476a, 478a). The contract, worth $4.5 million per year in fees to AHP, was due to expire in June 1982 (*id.* at 478a, 513a).

In April 1982, Robert Hurst was elected to be president of the FOP (C.A. App. 476a). As part of the process of renewing its health care contract, the FOP formed a 20-member committee to review various health benefit programs (*id.* at 478a). After overtures had been made to Hurst on behalf of petitioner, Hurst contacted the United States Attorney's office because he thought he "might be in for a bribe" with respect to renewal of the AHP contract (*id.* at 479a-480a). Acting in cooperation with the government, Hurst met with petitioner on May 10, 1982 (*id.* at 481a).

Hurst met again with petitioner on May 13; during this meeting Hurst wore a recording device (C.A. App. 487a, 488a). Petitioner assured Hurst that he was reliable, pointing to his testimony during a recent federal criminal trial (*id.* at 955a-956a). In an effort to retain the FOP contract for AHP, petitioner then discussed alternative types of inducements for Hurst, eventually offering Hurst a home in the Pocono Mountains (*id.* at 960a-961a, 963a). Petitioner suggested that Hurst and his wife visit the Poconos to look for a

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[1]"C.A. App." refers to petitioner's appendix in the court of appeals.

home and offered to provide spending money to Hurst for the trip (*id.* at 965a-966a). In addition, petitioner offered Hurst the use of his seaside home in Margate, New Jersey (*id.* at 970a).

By prior arrangement, petitioner and Hurst also met the next day at a Philadelphia department store (C.A. App. 971a-972a, 513a). Following lunch, petitioner handed Hurst a "wad of bills" that petitioner said contained $1,000; included with the money were several tickets to Philadelphia Phillies games and AHP brochures (*id.* at 514a-516a). At no time had Hurst ever requested money from petitioner (*id.* at 515a).

On May 19, 1982, petitioner and Hurst met again at a cafe. Petitioner repeated his offer to let Hurst use his Margate condominium (C.A. App. 516a, 974a). Petitioner also gave Hurst another unsolicited $1,000 in a matchbox and indicated he would pay him an additional $5,000 at a meeting in Margate (*id.* at 517a, 520a, 974a, 975a). On June 4, 1982, petitioner met Hurst in a Margate motel, a meeting that was videotaped by the FBI (*id.* at 520a-521a). During the meeting, petitioner gave Hurst an unsolicited payment of $5,000 wrapped in a plastic bag (*id.* at 978a).

On June 11, 1982, Hurst introduced petitioner to Michael Lutz, recording secretary of the FOP, who was in charge of the FOP review of various health plans (C.A. App. 622a, 986a). During a meeting in a hotel room, Lutz voiced concern about AHP to petitioner, and shortly thereafter petitioner gave Lutz an unsolicited $1,000 payment (*id.* at 623a, 625a-626a, 627a).

2. On appeal, petitioner raised a number of challenges to his convictions, including the argument that he was denied a fair trial by the district court's failure to take adequate measures to prevent jury exposure to prejudicial publicity during trial (Pet. App. A3 n.l). In affirming, the court of

appeals found it unnecessary to discuss the claim of jury exposure to publicity, concluding that it was "without merit" (*id.* at A3).

ARGUMENT

Petitioner contends (Pet. 12-22) that the district court committed reversible error and deprived him of a fair trial by declining either to conduct daily individual voir dire of the jurors regarding their possible exposure to news accounts that appeared during the trial or to make a post-trial inquiry of the individual jurors regarding that publicity. A full exposition of the record shows that petitioner's contention is unfounded and does not warrant this Court's review.

1. Trial of this case began on Monday, April 11, 1983. On the morning of April 12, the Philadelphia Inquirer, § B, at 3, carried a report of the trial that revealed that petitioner had previously entered a guilty plea in the case but had withdrawn it and chosen to go to trial (see C.A. App. 494a, 1294a).[2] That morning, petitioner requested and was granted individual voir dire of each of the jurors in private (C.A. App. 495a-496a). All of the jurors testified that they had neither seen any news accounts of the trial nor discussed the trial with anyone (*id.* at 496a-509a). Juror 11 stated that he had a copy of the newspaper but that he had not yet read it. The district court instructed him, as it instructed all the jurors individually, that he should avoid any news account of the trial and should not discuss the trial with anyone. *Ibid.*; see especially *id.* at 506a-507a.

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[2]In accordance with a plea agreement with the government, petitioner entered a plea of guilty in this case. When the government later determined that petitioner had breached his agreement, the district court permitted him to withdraw the plea. See generally Gov't C.A. App. 68a-78a, 104a-106a; C.A. App. 22a-33a.

At the conclusion of the individual voir dire, the court again cautioned the jury as a group that it must take care not to learn information about the case outside the courtroom that might contaminate its judgment. In addition, although not banning the jurors from reading the newspaper altogether, the court specifically instructed the jury to avoid all types of news accounts of the trial. C.A. App. 510a-511a. At the end of that first day of trial, the court once more admonished the jury against reading or listening to news accounts about the case (*id.* at 627a-628a).

On the evening of April 12, during its 11 p.m. news broadcast, a local television station reported an account of the trial, including the fact that petitioner had earlier pleaded guilty to charges in this case but had later withdrawn the plea (C.A. App. 634a). The next day, defense counsel requested that the district court voir dire the jurors individually to determine whether they had been exposed to the broadcast.[3] The court stated that it would first ask the jury as a group whether anyone had seen or heard any news accounts, and, if so, individual inquiry would then be made. However, none of the jurors had seen or heard any news report. C.A. App. 634a-635a.

Evidence in the trial was concluded on April 13. Prior to the luncheon recess, the district court reminded the jurors to avoid any news reports about the case (C.A. App. 646a). Following counsel's closing arguments, the court forbade the jury from reading newspapers or listening to news broadcasts in any form. It explained that it was taking this

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[3]As petitioner notes (Pet. 5), the April 13 Philadelphia Inquirer again carried an account of the trial (C.A. App. 129ba), but petitioner's motion made no reference to this newspaper article (*id.* at 634a).

measure as a means of maintaining the integrity of the trial process without sequestering the jury and that it would again inquire about news exposure in the morning. C.A. App. 744a-745a.

On April 14, 1983, the Philadelphia Daily News carried a news account and an editorial regarding the trial (C.A. App. 1298a-1299a). Petitioner's counsel did not request individual voir dire of the jurors (C.A. App. 1214a), but instead moved for a mistrial (*id.* at 750a). The district court denied the motion because it was based simply on the fact that articles had appeared in the newspapers and not on the fact that the jurors had seen any of the stories (*id.* at 750a-751a). All of the jurors again disclaimed having seen or read any news accounts of the trial (*id.* at 751a-752a).

At the conclusion of the first day of deliberations, petitioner moved to have the jury sequestered. The district court denied this motion because sequestration had not been raised at the time the jury was selected and the jurors were not prepared for it (C.A. App. 843a). The court did, however, reiterate in detail the prior instructions that the jurors must not read or listen to any news accounts and must not permit discussions of the trial in their presence. The court also stated that it would again inquire in the morning whether the jury had been inadvertently exposed to any news stories. *Id.* at 844a-845a.

On the morning of Friday, April 15, the jurors indicated that they had neither seen nor heard anything regarding the trial (C.A. App. 847a). Petitioner's counsel did not move for individual voir dire of the jurors (*id.* at 1214a). Toward the end of the day, the jury requested that it be excused from further deliberations until Monday because of prior commitments of some of the jurors. Petitioner did not object to

that request (*id.* at 858a-859a),[4] and the district court granted it. In doing so, the court emphasized to the jurors that they must be especially cautious to avoid any exposure to news broadcasts over the weekend (*id.* at 859a).

On Monday morning, April 18, the district court once more inquired into the question of prejudicial publicity, and the jurors again disclaimed any exposure to news reports or discussions of the trial (C.A. App. 862a). Contrary to his claim (Pet. 9), petitioner made no request for individual voir dire of the jury (C.A. App. 1214a). That afternoon, the jury returned its verdicts. Before the jurors were excused, petitioner made no further motion that the jurors be interrogated about exposure to news accounts (*ibid.*).[5]

Immediately prior to sentencing, petitioner requested that his counsel or the district court conduct individual voir dire of each of the jurors at a post-trial hearing to determine whether any of them had learned that petitioner had pleaded guilty but withdrawn his plea prior to trial (C.A. App. 1223a). The court denied the motion as simply a variant of the previously rejected argument that daily individual voir dire of the jurors was required. The court found no reason to believe, based on the jurors' daily response to its inquiries, that the jurors had lied when asked whether they had been exposed to news accounts or discussions of the trial. *Id.* at 1223a-1224a.

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[4]Despite petitioner's claim (Pet. 8) that he moved for sequestration of the jury for the weekend, the record reflects no such motion. While there is, of course, no transcript of any off-the-record conference that may have been held with the court or the United States Marshal regarding sequestration, the record clearly reflects that petitioner's counsel made no objection to the district judge's decision in open court to excuse the jury for the weekend (C.A. App. 859a).

[5]Shortly after trial, the district court denied motions of both parties to interview the jury (C.A. App. 1224a).

2. It is well settled that the district court "has substantial discretion in deciding whether allegations [of prejudice affecting the jury's verdict] are of sufficient substance to require investigation and, if so, how the investigation should be conducted." 3 C. Wright, *Federal Practice and Procedure: Criminal* § 554, at 261-262 (1982). Petitioner has failed to show that the district court erred in the circumstances of this case in declining either to conduct individual voir dire of the jurors on a daily basis or to hold a post-trial hearing to make such an individualized inquiry of each juror.

a. Contrary to petitioner's argument, the courts of appeals have recognized that a district court is not required to conduct individual voir dire of each juror on the issue of exposure to prejudicial publicity during trial. See, *e.g.*, *United States* v. *Perrotta*, 553 F.2d 247, 249-250 (1st Cir. 1977); *United States* v. *Tsanas*, 572 F.2d 340, 342, 347 (2d Cir.), cert. denied, 435 U.S. 995 (1978); *United States* v. *Jackson*, 649 F.2d 967, 974 (3d Cir.), cert. denied, 454 U.S. 871 and 1034 (1981); *United States* v. *Crowell*, 586 F.2d 1020, 1024 (4th Cir. 1978), cert. denied, 440 U.S. 959 (1979); *United States* v. *Jones*, 542 F.2d 186, 194 (4th Cir.), cert. denied, 426 U.S. 922 (1976); *United States* v. *Hankish*, 502 F.2d 71, 77 (4th Cir. 1974); *United States* v. *Phillips*, 664 F.2d 971, 997-998 (5th Cir. 1981), cert. denied, 457 U.S. 1136 and 459 U.S. 906 (1982); *United States* v. *Ricardo*, 619 F.2d 1124, 1131-1132 (5th Cir.), cert. denied, 449 U.S. 1063 (1980); *United States* v. *Capo*, 595 F.2d 1086, 1092-1093 (5th Cir. 1979), cert. denied, 444 U.S. 1012 (1980); *United States* v. *Wilson*, 715 F.2d 1164, 1168-1169 (7th Cir. 1983), cert. denied, No. 83-5598 (Nov. 14, 1983) and No. 83-5702 (Jan. 9, 1984); *Margoles* v. *United States*, 407 F.2d 727, 735 (7th Cir.), cert. denied, 396 U.S. 833 (1969); *United States* v. *Eaglin*, 571 F.2d 1069, 1985 n.21 (9th Cir. 1977), cert. denied, 435 U.S. 906 (1978).

The decisions cited by petitioner (Pet. 16-17 n.11) do not establish a different rule. In three of those cases, the court of appeals simply described the fact that the district court had conducted individual voir dire on the issue of exposure to prejudicial publicity; there was no indication, however, that voir dire of the jury as a group would have been reversible error. See *United States* v. *Gigante*, 729 F.2d 78, 81 (2d Cir. 1984), cert. denied, No. 83-1699 (May 21, 1984); *United States* v. *Krevsky*, 741 F.2d 1090, 1093 (8th Cir. 1984); *Parker* v. *United States* 404 F.2d 1193, 1197 (9th Cir. 1968), cert. denied, 394 U.S. 1004 (1969).[6] In the remaining two cases upon which petitioner relies, the district court had failed to conduct any voir dire at all. See *United States* v. *Herring*, 568 F.2d 1099, 1104-1105 (5th Cir. 1978);[7] *Mares* v. *United States*, 383 F.2d 805, 808 (10th Cir. 1967).[8]

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[6]Furthermore, to read *Gigante* and *Parker*, as petitioner does, to require individual voir dire would bring those decisions into conflict with the decisions of the respective circuits in *United States* v. *Tsanas, supra*, and *United States* v. *Eaglin, supra*.

[7]In *United States* v. *Capo*, 595 F.2d at 1093, the Fifth Circuit made clear that *Herring* does not require a district court to undertake individual voir dire in all cases to determine whether jurors were exposed to media publicity during trial.

[8]In *Mares*, the court of appeals, in ruling on the issue of voir dire to determine whether there had been juror exposure to publicity during trial, relied on the decision in *Coppedge* v. *United States*, 272 F.2d 504, 508 (D.C. Cir. 1959), cert. denied, 368 U.S. 855 (1961). See 383 F.2d at 809 n.7. But *Coppedge* involved the question whether exposure to publicity was prejudicial, not whether, as in *Mares* and in this case, such exposure had occurred at all. As the courts of appeals have recognized, individual voir dire is appropriate on the issue of prejudicial effect because of possible juror reticence to admit prejudice in front of other jurors and the need to prevent any prejudice from being spread to the entire jury. See *United States* v. *Jackson*, 649 F.2d at 976; *United States* v. *Tsanas*, 572 F.2d at 347; *United States* v. *Perrotta*, 553 F.2d at 250. As the courts have also recognized, such concerns do not equally apply to the antecedent question whether a juror was exposed to media publicity in the first instance, and therefore individual voir dire is not required.

In this case, the approach followed by the district court was not error. On the first occasion that adverse publicity occurred during trial, the district court granted individual voir dire of each of the jurors, which revealed that none of them had been exposed to the article in question. Each of the jurors was then instructed to avoid any news account or discussion about the trial, and this admonition was subsequently repeated several times. In addition, the court thereafter conducted voir dire of the jury as a group on a number of instances and was satisfied that no juror exposure had occurred. Finally, the court ultimately admonished the jury to avoid all exposure to newspapers or broadcasts regardless of whether they concerned the petitioner's case. As the above-cited decisions demonstrate (see page 8, *supra*), these measures were adequate to preserve petitioner's right to a fair trial and did not constitute reversible error.

b. There is likewise no merit to petitioner's contention that the district court erred in declining to hold a post-trial hearing in order to conduct individual voir dire of each juror. As discussed above, the district court took adequate steps during trial to ensure that the jury was not exposed to prejudicial publicity. Because the issue of jury exposure had been raised and resolved in the course of the trial, it was not error for the district court to decline to commence a post-trial hearing to address the matter.[9]

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[9]This case is therefore unlike those upon which petitioner relies (Pet. 12, 14-15, 20), such as *Smith* v. *Phillips*, 455 U.S. 209 (1982), in which the issue of jury prejudice arose only after the trial had been concluded. See also *Rushen* v. *Spain*, No. 82-2083 (Dec. 12, 1983), slip op. 4-6. In that situation, a post-trial hearing "in which the defendant has the opportunity to prove actual bias" is necessary to determine whether there has been a violation of " 'the defendant's right * * * [to have] the particular jury that heard the case * * * adjudicate fairly' " (455 U.S. at 215, 217; citation omitted). Here, however, the safeguards taken in the course of the trial protected against unfair prejudice and obviated the need for a post-trial hearing. In this case the district court during trial was "ever watchful to prevent prejudicial occurrences" (*id.* at 217).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 84-1065

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October Term, 1984

CHARLES S. KRAVITZ,

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v.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where inherently prejudicial publicity — the disclosure of a defendant's withdrawn guilty plea — is pervasively and continuously disseminated in the newspapers and on television throughout the community *during* defendant's trial and where the District Court does not individually *voir dire* the jury concerning such continuing publicity either during deliberations or, at least, following an unsequestered weekend recess, does the District Court's refusal to conduct a post-verdict hearing to *voir dire* the jurors individually in order to determine whether any juror learned during the trial of defendant's withdrawn guilty plea violate this Court's mandate in *Smith v. Phillips*, 455 U.S. 209 (1982) and *Remmer v. United States*, 347 U.S. 227 (1954) and require summary reversal and remand for such hearing?

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

The sole relief requested in this Petition is summary remand for a post-verdict hearing to conclusively determine whether any juror learned during the trial of Petitioner's withdrawn guilty plea. Contrary to the government's argument (Brief in Opp. 1, 4, 8-9), Petitioner does *not* seek a new trial on the ground that the District Court failed to individually *voir dire* the jurors during trial. Instead, Petitioner seeks only a post-verdict hearing in accordance with this Court's clear mandate in *Smith v. Phillips*, 455 U.S. 209 (1982) and *Remmer v. United States*, 347 U.S. 227 (1954), a mandate faithfully adhered to by the federal Circuit Courts of Appeal, with

the sole exception of the Third Circuit. (Pet. 21 n.16.) The government's response on this issue is limited to a single paragraph (with one footnote) at the end of the government's brief.

Significantly, the government does not dispute, nor can it dispute, that the reporting during a trial, as here, of a defendant's prior withdrawn guilty plea is so extremely prejudicial that special precautions must be taken to ensure the impartiality of a jury's verdict. (Pet. 13, 15 and n.9, 17.) Nor does the government deny, because it cannot, that in *Smith v. Phillips* and its progeny this Court explicitly confirmed that a defendant has a right to demonstrate at a post-verdict hearing that such publicity "compromised the ability of the particular jury that heard the case to adjudicate fairly." 455 U.S. at 217. (Pet. 12-13, 20-21.)

Evidently recognizing that there can be no justification in logic or law for the failure to conduct such a hearing in this case, the government devotes the bulk of its argument to the straw issue of whether the District Court erred in failing to conduct individual *voir dire* during trial. The question of individual *voir dire* during trial, however, was not raised as a ground for this Court's review in the Petition and is irrelevant.[1] Rather, Petitioner simply observed that the error in failing to conduct a post-verdict hearing *after* trial was made all the more egregious by the fact that the District Court's prophylactic measures *during* trial were entirely inadequate in light of the severe nature and degree of the in-trial publicity.

For example, in addition to failing to conduct individual *voir dire*, the District Court also (i) failed to remove a newspaper containing a prejudicial article from

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1. In any event, contrary to the government's claim (Brief in Opp. 6), the record of the post-trial argument reflects the District Court's agreement that Petitioner properly preserved his request for individual *voir dire* each day of the trial. (C.A. App. 1216a.)

the jury room during trial, (ii) refused to sequester the jury at the beginning of its deliberations even though the two most prejudicial articles appeared the morning deliberations began, (iii) allowed the jury to return home for a weekend recess when the community was saturated by the prejudicial publicity, and (iv) denied the reasonable requests of both government and defense counsel to interview the jurors after the verdict.[2] Simply stated, a post-verdict hearing is now necessary because the inadequate precautions taken by the District Court simply have not ensured that the jury remained impartial given the special circumstances surrounding this case.

The government contends that it is unnecessary to conduct a post-verdict hearing and seeks to distinguish *Smith v. Phillips* on the ground that "the issue of jury exposure had been raised and resolved in the course of the trial" and "the safeguards taken . . . protected against unfair prejudice and obviated the need for a post-trial hearing." (Brief in Opp. 10 and n.9.) To the contrary, the government's assertion completely ignores this Court's clear admonition in *Smith v. Phillips* that such a conclusion is never warranted, even in cases where more careful precautions are taken:

> *The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible;* it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. . . . *Such determinations [of prejudicial occurrences] may prop-*

2. Contrary to the government's claim that Petitioner did not object to the District Court's decision to excuse the jury for the weekend (Brief in Opp. 7 n.4), the record clearly reflects Petitioner's continued request for sequestration and the District Court's denial of same. (C.A. App. 843a.) Moreover, during argument before the Court of Appeals, the government conceded that Petitioner requested sequestration of the jury at all times during its deliberations.

> *erly be made at a [post-trial] hearing like that ordered in Remmer and held in this case.*

455 U.S. at 217 (emphasis added). (Pet. 14-15.)

More fundamentally, however, in the absence of a post-verdict hearing, the government, Petitioner and this Court can, at best, only speculate whether the measures taken by the District Court did, in fact, preserve Petitioner's right to a fair trial. The issue of jury exposure to prejudicial publicity was not and could not have been "resolved" by the limited and inadequate "safeguards" employed by the District Court in this case. Indeed, in *Smith* this Court confirmed that:

> *[T]he appropriate safeguard* against such prejudice [from publicity during trial] is the defendant's *right to demonstrate* [in a post-verdict hearing] that the media's coverage of his case — be it printed or broadcast — compromised the ability of the particular jury that heard the case to adjudicate fairly.

455 U.S. at 217 (emphasis added). Thus, the need for a post-verdict hearing in this case has not been "obviated" as the government contends.

Given the clear *Smith* mandate, it is not surprising that the government addresses Petitioner's request for a post-verdict hearing in but one paragraph and one footnote. In essence, the strategy of the government's response is to attack a straw issue not asserted as a ground for review — the failure to conduct individual *voir dire* during trial — and then to argue that the real issue — the failure to conduct a post-verdict hearing — is "resolved" by its straw argument concerning the adequacy of *en masse voir dire*.[3] The net effect of this strategy is an abject failure to provide any credible response what-

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3. The cases string-cited by the government (Brief in Opp. 8) in which the trial court was not required to individually *voir dire* jurors are in any event inapposite since none involved inherently prejudicial publicity, as here, of a withdrawn guilty plea.

soever to the sole issue actually raised by Petitioner. The government thus tacitly concedes that the District Court erred in failing to conduct a post-verdict hearing, violating this Court's directive in *Smith v. Phillips*. As this Court held in *Smith:*

> Preservation of the *opportunity* to prove actual bias is a guarantee of a defendant's right to an impartial jury.

455 U.S. at 216 (emphasis added).

Given the extreme, exceptional and, indeed, unique circumstances presented by this case — the repeated reporting of Petitioner's withdrawn guilty plea, especially during jury deliberations — the only way that it can now be guaranteed that Petitioner received his fundamental right to an impartial jury is through a post-verdict hearing. A simple summary remand for such a hearing will achieve that result and is all that this Petitioner requests.

Respectfully submitted,

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